Supreme Court, U. S.
FILED
OCT 18 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-431

THEODORE L. SENDAK,
Attorney General of Indiana,

Appellant,

vs.

ROBERT D. ARNOLD, M.D.,
H. C. MOSS, M.D.,
NEIL R. STRICKLAND, M.D.,
IRVING ROSENBAUM, M.D.,
PAUL L. GUISE, M.D.,
WALTER L. OWENS, M.D.,

Appellees.

Appeal From The United States District Court
For The Southern District of Indiana
Indianapolis Division

MOTION TO DISMISS OR AFFIRM

SIGMUND J. BECK
Bamberger & Feibleman
500 Union Federal Building
Indianapolis, Indiana 46204
Telephone: (317) 639-5151

EDWARD W. HARRIS, III
Sommer, Barnard, Freiberger & Scopelitis
815 Merchants Bank Building
Indianapolis, Indiana 46204
Telephone: (317) 639-3454

D. ROBERT WEBSTER
Ice, Miller, Donadio & Ryan
111 Monument Circle, 10th Floor
Indianapolis, Indiana 46204
Telephone: (317) 635-1213

RONALD E. ELBERGER
Bose, McKinney & Evans
1100 First Federal Building
Indianapolis, Indiana 46204
Telephone: (317) 637-5353

Attorneys for Appellees

Central Publishing Company, Inc., Indianapolis, Ind. 46206

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-431

THEODORE L. SENDAK,
Attorney General of Indiana,

Appellant,

vs.

ROBERT D. ARNOLD, M.D.,
H. C. MOSS, M.D.,
NEIL R. STRICKLAND, M.D.,
IRVING ROSENBAUM, M.D.,
PAUL L. GUISE, M.D.,
WALTER L. OWENS, M.D.,

Appellees.

Appeal From The United States District Court
For The Southern District of Indiana
Indianapolis Division

MOTION TO DISMISS OR AFFIRM

Appellees in the above-entitled case move to dismiss or affirm on the grounds that the appeal has not been taken in time and that the questions presented are so unsubstantial as not to need further argument.

I.

JURISDICTION

Judgment of the District Court together with the Memorandum of Decision was entered on June 15, 1976. The appellant docketed the case on September 23, 1976, more than ninety (90) days since the entry of judgment. The time for docketing the case has not been extended by a Justice of this Court. (Rule 13 of this Court).

It appears accordingly that appellant's appeal is out of time and should be denied.*

II.

FRIVOLITY OF APPEAL

Appellant sets forth the proposition that the entry of Summary Judgment was improper in that no affidavits supported the complaint and that the supposed issue of fact relates to the standing of the plaintiffs to bring the action and the possibility of the lack of a real case or controversy.

The Judgment herein rendered invalid that portion of the Indiana abortion statute which required a physician to perform the abortion in a hospital or licensed health facility in the first trimester of pregnancy. Appellants have not denied that the plaintiffs are doctors but would infer that this is the fact in issue.

To recognize the spuriousness of the argument it should be noted that the parties to this suit were the identical parties in an action in the same District Court in which

*The Court might find this case the appropriate vehicle to set forth standards for waiving docketing requirements as suggested by Justice Douglas in his dissent in *State Board of Election Commissioners* v. *Evers*, 405 U.S. 1001 (1972).

Judgment was rendered on March 5, 1973 declaring that the laws in Indiana pertaining to abortions, in force at that time, were unconstitutional. The Indiana abortion statute was thereafter revised and amended by the Indiana General Assembly on April 24, 1973. Plaintiffs filed motion in the previous action (U.S. District Court, Southern District of Indiana, No. IP 70-C-217) requesting leave to file supplemental complaint challenging the new Indiana abortion statute found at Indiana Code § 35-1-58.5 (Acts 1973, P.L. 322). The Court entered its order on October 8, 1973 denying the motion of the plaintiffs to file the supplemental complaint without prejudice. The plaintiffs thereupon filed the within action on January 2, 1974. It would appear that the standing of the instant plaintiffs and the nature of the controversy should be apparent to all parties. The District Court may take judicial notice of its own decisions.

The lack of standing and case or controversy argument is effectively disposed of by *Doe* v. *Bolton*, 410 U.S. 179 (1973).

In addition, plaintiffs' standing to sue and the presence of a case or controversy is clear from the allegations in paragraph 11 of plaintiffs' complaint, which defendants did not attempt to controvert, that:

> "Each of the above plaintiffs, acting in his professional capacity as a registered and licensed physician and surgeon in the State of Indiana, is hindered, deterred, and threatened and his practice of medicine is seriously impaired by the existence, actual or threatened enforcement, effect, application and impact of the challenged statutory provisions. The interference by the State into abortions by qualified physicians during the first trimester prevents the plaintiffs and other qualified Indiana physicians from practicing medicine according to the highest professional standards."

The additional argument of the appellant attempts to distinguish the issue presented from that of *Doe* v. *Bolton (supra)* in that the Indiana law requires that the abortion be performed in a hospital or licensed health facility, whereas the Georgia statute in *Doe* required that it be performed in a hospital accredited by the Joint Committee on Accreditation of Hospitals. The difference might be reasonable if the Indiana statute did not mandate the use of the facility in the first trimester. The statute thus does not relate reasonably to the preservation and protection of health as set down in *Roe* v. *Wade*, 410 U.S. 113 (1973).

III.

CONCLUSION

Appellees respectfully submit that the appeal is out of time, no cause has been shown for permitting the same, the questions presented are so unsubstantial as not to need further argument. Therefore the Appellees respectfully move the Court to dismiss the appeal or in the alternative to affirm the judgment entered in the cause by the United States District Court for the Southern District of Indiana.

Respectfully submitted,

SIGMUND J. BECK
EDWARD W. HARRIS, III
D. ROBERT WEBSTER
RONALD E. ELBERGER
Attorney for Appellees